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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1947

No. 553

ERNEST EDGAR JUSTICE,
Petitioner,

vs:

STATE OF WEST VIRGINIA,
Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Supreme Court of Appeals,

and

BRIEF AND ARGUMENT IN SUPPORT THEREOF

CLAY S. CROUSE
ANTHONY J. SPARACINO,

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SUPREME COURT OF THE UNITED STATES.

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ERNEST EDGAR JUSTICE,

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vs:

STATE OF WEST VIRGINIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the United States Supreme Court of Appeals.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your petitioner respectfully shows that at the March, 1946, term of the Criminal Court of Raleigh County, West Virginia, an indictment charging subornation of perjury was returned against him (R 525). Petitioner was duly arraigned, pleaded not guilty, was found guilty (R 537) by a jury and sentenced to confinement in the penitentiary of the State of West Virginia for a period of not less than one nor more than ten years (R 541). He was granted a writ of error and supersedeas by the Supreme Court of Appeals of West Virginia. On the 4th day of November, 1947, the Supreme Court of Appeals of the State of West Virginia rendered its judgment and opinion (R 560-569).

STATEMENT OF FACTS

At the March, 1946, term of the Criminal Court of Raleigh County, West Virginia, the Grand Jury returned an indictment against Handley Richards for perjury (R 72). The indictment charged that he testified falsely before a former Grand Jury. At the same term of court the same Grand Jury returned an indictment against the petitioner for subornation of perjury. The indictment against your petitioner charged that he induced the said Handley Richards to testify falsely (R 525). Richards was arraigned before the court and pleaded guilty as charged (R 72). The petitioner, when arraigned, pleaded not guilty to "surbornation of perjury as charged in the indictment," was found guilty by a jury, made timely application for a writ of error and supersedeas to the Supreme Court of Appeals of West Virginia (R 1-11). The latter court granted the writ. The case was fully argued and submitted for decision (R 559). The Supreme Court of Appeals of West Virginia held that the West Virginia Statute, West Virginia Code, Chapter 61, Article 5, Section 1, providing, in effect, that to testify falsely in a trial of a person for a felony or to induce another person so to do did not apply to a Grand Jury proceeding since a Grand Jury proceeding was not a trial as contemplated by the statute, and further held that the West Virginia Statute, West Virginia Code, Chapter 61, Article 8, Section 2, providing, in effect, that to swear falsely on any occasion other than a trial for a felony or to procure another person so to do is a misdemeanor, would apply to a Grand Jury proceeding and reversed and remanded the case for entry of a judgment for a misdemeanor (R 560-569). The West Virginia statutory penalty for procuring another person to swear falsely is con-

finement in jail for a period not more than one year or a fine of $1,000.00, or both, and the judgment of conviction deprives a person of holding an office of honor, trust or profit as well also as the right of jury service: West Virginia Code, Chapter 61, Article 5, Section 3.

In the course of the trial, the State was permitted to prove by the Clerk of the Criminal Court of Raleigh County, that Richards had been indicted by the Grand Jury for testifying falsely before a Grand Jury . . . (R 72); that he had been arraigned on the indictment and pleaded guilty to the charge therein (R 72). The State introduced in evidence the indictment of Richards (R 72), the court order showing his plea of guilty and the judgment of sentence entered thereon over the objection of the petitioner. Error was assigned to the introduction of this evidence (R 71-80).

The Supreme Court of Appeals of West Virginia, passed upon this assignment of error in the following manner:

"DEFENDANT ALSO ASSIGNS AS ERROR THE TRIAL COURT'S RULING IN PERMITTING THE INTRODUCTION OF THE INDICTMENT, THE PLEA OF GUILTY AND THE ORDER OF SENTENCE ON SUCH PLEA IN THE RICHARDS CASE. INASMUCH AS HANDLEY RICHARDS IS THE PERSON CHARGED IN THE INDICTMENT AS HAVING BEEN INDUCED TO COMMIT FALSE SWEARING, IT WAS NECESSARY FOR THE STATE, IN ORDER TO ESTABLISH ITS CASE, TO PROVE THAT RICHARDS TESTIFIED FALSELY BEFORE THE GRAND JURY, AND WE

CAN CONCEIVE OF NO BETTER WAY THAN BY EXHIBITING TO THE JURY THE RECORD EVIDENCE OF HIS CONVICTION FOR SUCH OFFENSE." (R 568).

JURISDICTION

The Supreme Court of Appeals of West Virginia, by its judgment and opinion, arbitrarily deprived the petitioner of his liberty without due process of law and denied the petitioner equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

QUESTION PRESENTED

Can a state court of last resort arbitrarily disregard the "law of the land" in passing upon the manner in which an admitted constituent element of an offense charged in an indictment may be proven?

REASONS RELIED ON FOR OBTAINING THE WRIT

(1) The judgment and opinion of the Supreme Court of Appeals of West Virginia holding that a constituent element of an offense charged in an indictment may be proven without regard to the "law of the land" because the court "can conceive no better way" is violative of Section 1 of the Fourteenth Amendment to the Constitution of the United States.

(2) The holding and judgment of the Supreme Court of Appeals of West Virginia complained of does not:

(a) Construe a state statute or constitutional provision.

(b) Apply a constitutional provision or state statute.

(c) Make or purport to make any application of the common law.

(3) Said judgment and opinion arbitrarily disregards applicable decisions of the Supreme Court of the United States, the Fourteenth Amendment to the Constitution of the United States and also applicable decisions of the Supreme Court of Appeals of West Virginia and other states in passing upon the question presented.

Your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Supreme Court of Appeals of the State of West Virginia, commanding that court to certify and send to this court for its review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings, together with all original exhibits on file in that certain cause numbered and entitled on its Docket No. 9913, State of West Virginia vs. Ernest Edgar Justice, and that the judgment of the Supreme Court of Appeals of the State of West Virginia may be reversed by this Court and that your petitioner be awarded a new trial and have such other and further relief in the premises as this Honorable Court may deem just and proper..

CLAY S. CROUSE

ANTHONY J. SPARACINO,

Attorneys for petitioner.

SUPREME COURT OF THE UNITED STATES.

October Term, 1947

No._____

ERNEST EDGAR JUSTICE, Petitioner,

vs.

STATE OF WEST VIRGINIA, Respondent.

BRIEF AND ARGUMENT

In Support of Petitioner's Petition
for Writ of Certiorari

POINT I.

A STATE CANNOT ARBITRARILY EXERCISE ITS JUDICIAL POWERS AND THEREBY DENY EQUAL AND IMPARTIAL JUSTICE UNDER THE LAW WITHOUT VIOLATING THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

Caldwell vs. Texas, 137 U. S. 692.

State vs. Sponaugle et als, 45 W. Va. 415, 424, 32 S. E. 283.

POINT II.

ALL PEOPLE MUST STAND ON AN EQUALITY BEFORE THE BAR OF JUSTICE IN EVERY AMERICAN COURT.

Chambers vs. State of Florida, 309 U. S. 27.

POINT III.

THE JUDGMENT AND OPINION OF THE SUPREME COURT OF APPEALS OF WEST VIRGINIA, HOLDING THAT A CONSTITUENT ELEMENT OF AN OFFENSE CHARGED IN AN INDICTMENT MAY BE PROVEN WITHOUT REGARD TO THE "LAW OF THE LAND" BECAUSE THE COURT "CAN CONCEIVE OF NO BETTER WAY," IS VIOLATIVE OF THE FOURTEENTH AMENDMENT TO CONSTITUTION OF THE UNITED STATES.

Dartmouth College vs. Woodward, 4 Wheaton 517, 581.

Petrie vs. Buffington, 79 W. Va. 113, 119, 90 S. E. 557.

POINT IV.

THE "LAW OF THE LAND" CONTROLLING THE INTRODUCTION OF EVIDENCE TO ESTABLISH PERJURY, A CONSTITUENT ELEMENT OF THE OFFENSE CHARGED IN THE INDICTMENT IN THIS CASE, WAS ARBITRARILY DISREGARDED.

WEST VIRGINIA CONSTITUTION, ARTICLE 8, SECTION 21 — "Such parts of the common law, and of the laws of this State as are in force when this article goes into operation, and are not repugnant thereto, shall be and continue the law of the State until altered or repealed by the Legislature. All civil and criminal suits and proceedings pending in the former circuit courts of this State, shall remain and be proceeded in before the circuit courts of the counties in which they were pending."

WEST VIRGINIA CONSTITUTION, ARTICLE 3, SECTION 10 — "No person shall be deprived of life, liberty, or property, without due process of law, and the judgment of his peers."

Smith vs. White, 63 W. Va. 472, 60 S. E. 404 14 L. R. A. N. S. 530.

Kirby vs. U. S., 174 U. S. 47.

Phillips vs. Ohio Valley Electric Co., 78 W. Va. 776, 90 S. E. 342.

Johnson vs. Girdwood, 28 N. Y. S. 151.

Peoples vs. Creagan, 53 Pac. 1082.

POINT V.

THE SUPREME COURT OF APPEALS OF WEST VIRGINIA IS "BOUND BY THE COMMON LAW UNLESS CHANGED BY OUR CONSTITUTION OR STATUTES (CONST., ART. VIII, SEC. 21), AND THERE HAS BEEN NO CHANGE BY EITHER."

Emery vs. Monongahela West Pen Public Service Co., 111 W. Va. 699 at page 708, 163 S. E. 620.

POINT VI.

THE RIGHT OF AN ACCUSED TO BE CONFRONTED WITH WITNESSES AGAINST HIM IS A SUBSTANTIAL COMMON LAW RIGHT. THE EMBODIMENT OF THIS RIGHT INTO CONSTITUTIONAL PROVISIONS IS DECLARATORY OF THE COMMON LAW.

Kirby vs. U. S. 174 U. S. 47.

Smith vs. White, 63 W. Va. 472.

St. Mathew's Gospel Ch., 26 Ver. 59, 60.

Wigmore on Evidence, 3rd Edition, Vol. 5, Sec. 1397.

POINT VII.

WHEN A STATE COURT OF LAST RESORT SUSTAINS A CONVICTION BY ARBITRARILY REFUSING TO RECOGNIZE A COMMON LAW RIGHT OF SUCH AN IMPORTANT AND FUNDAMENTAL CHARACTER AS THE RIGHT OF AN ACCUSED TO BE CONFRONTED WITH WITNESSES AGAINST HIM, THE ACCUSED IS THEREBY DEPRIVED OF HIS LIBERTY WITHOUT DUE PROCESS OF LAW.

West vs. Louisiana, 194 U. S. 258.

WEST VIRGINIA STATUTES HERETOFORE QUOTED

WEST VIRGINIA CODE, CHAPTER 61, ARTICLE 5, SECTION 1 — "PERJURY AND SUBORNATION OF PERJURY DEFINED. To wilfully testify falsely, under oath or affirmation lawfully administered, in a trial of the witness or any other person for a felony, concerning a material matter or thing, is perjury and is a felony; to induce or procure another person so to do is subornation of perjury and is a felony."

WEST VIRGINIA CODE, CHAPTER 61, ARTICLE 5, SECTION 2 — "FALSE SWEARING DEFINED. To wilfully swear falsely, under oath of affirmation lawfully ad-

ministered, in a trial of the witness or any other person for a felony, concerning a matter or thing not material, and on any occasion other than a trial for a felony, concerning any matter or thing material or not material, or to procure another person to do so, is false swearing and is a misdemeanor."

WEST VIRGINIA CODE, CHAPTER 61, ARTICLE 5, SECTION 3 — "PENALTIES FOR PERJURY, SUBORNATION OF PERJURY, AND FALSE SWEARING. A person convicted of perjury or subornation of perjury shall be confined in the penitentiary not less than one nor more than ten years, and a person convicted of false swearing shall be fined not more than one thousand dollars, and, in the discretion of the court, confined in jail not more than one year. And in either case the person convicted shall be adjudged forever incapable of holding any office of honor, trust or profit in this State, or of serving as a juror."

ARGUMENT

Petitioner's counsel respectfully submits that the phrase EQUAL-JUSTICE-UNDER-LAW conveys an appropriate idea of the meaning of the phrase "due process of law" and its equivalent phrase "law of the land." The Supreme Court of Appeals of West Virginia has heretofore adopted the following definition of due process of law.

"... THE DUE COURSE OF LEGAL PROCEEDINGS ACCORDING TO THOSE RULES AND FORMS WHICH HAVE BEEN ESTABLISHED FOR THE PROTECTION OF PRIVATE RIGHTS SECURING TO EVERY PERSON A

JUDICIAL TRIAL BEFORE HE CAN BE DEPRIVED OF LIFE, LIBERTY OR PROPERTY." *Peerce vs. Kitzmiller*, 19 W. Va. 564, Syl. 1; *Floyd vs. Railway Co.*, 112 W. Va. 66 at page 73, 164 S. E. 28, and the often quoted definition given by Mr. Webster in the Dartmouth College case:

> "BY THE LAW OF THE LAND, IS MOST CLEARLY INTENDED THE GENERAL LAW; A LAW WHICH HEARS BEFORE IT CONDEMNS; WHICH PROCEEDS UPON INQUIRY, AND RENDERS JUDGMENT ONLY AFTER TRIAL. THE MEANING IS, THAT EVERY CITIZEN SHALL HOLD HIS LIFE, LIBERTY, PROPERTY AND IMMUNITIES, UNDER THE PROTECTION OF THE GENERAL RULES WHICH GOVERN SOCIETY. EVERYTHING WHICH MAY PASS UNDER THE FORM OF AN ENACTMENT, IS NOT, THEREFORE, TO BE CONSIDERED THE LAW OF THE LAND."

We are unable to find a single instance in which a court of last resort has upheld a conviction because the court "could conceive of no better way" than for the state to carry its burden of proof contrary to procedure which follows those rules and forms which have been established for the protection of private rights.

The law of the State of West Virginia pertaining to a person being affected by the event of a suit to which he was not a party clearly appears from the opinion of the case Smith vs. White, supra. We quote from the opinion:

" 'THERE IS NO GENERAL PRINCIPLE OF LAW THAT SEEMS BETTER SETTLED THAN THAT NO ONE SHALL BE INJURED OR AFFECTED BY THE EVENT OF ANY SUIT OF WHICH HE WAS NOT A PARTY; THE REASONS OF WHICH ARE LAID DOWN IN ALL THE BOOKS, AND ARE TOO OBVIOUS TO NEED REPEATING HERE.' AUTHORITIES ARE FOUND IN 6 ENCY. DIGEST, 283. ON PAGE 285 WE FIND THIS: 'THE REASON IS OBVIOUS. HE HAS NO POWER TO CROSS-EXAMINE WITNESSES, OR ADDUCING EVIDENCE IN MAINTENANCE OF HIS RIGHTS; IN SHORT HE IS DEPRIVED OF ALL MEANS PROVIDED BY LAW FOR ASCERTAINING THE TRUTH, AND CONSEQUENTLY IT WOULD BE REPUGNANT TO THIS FIRST PRINCIPLE OF JUSTICE, THAT HE SHOULD BE BOUND BY THE RESULT OF AN INQUIRY TO WHICH HE IS ALTOGETHER A STRANGER. CITING *Payne vs. Coles,* 1 Munf. 373; *Turpin vs. Thomas,* 3 Hen. & Munf. 139.' "

The right denied the petitioner in the course of the trial of this case as appears from the opinion and judgment of the court, (R 568) is a substantial common law right. This right was recognized at the time of the trial of Christ before the Sanhedrin. It was written into Magna Carta, the Constitution of the United States and the Constitution and Statutes of West Virginia. It is a cherished land mark of liberty by people of other nations. It was recognized in the course of the trials of war criminals in Nurenberg

and Tokyo. If the people of other nations were given this right by their respective governments, the necessity of the Marshall Plan would be materially lessened.

Respectfully submitted,

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ANTHONY J. SPARACINO,

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